DOCUMENT RESUME

ED 376 769 HE 027 906

AUTHOR McMullan, Sandra H.
TITLE Managing Liability. Employment Discrimination: A Risk Management Strategy.
INSTITUTION United Educators Insurance Risk Retention Group, Inc., Chevy Chase, MD.
PUB DATE [94]
NOTE 17p.
AVAILABLE FROM United Educators Insurance Risk Retention Group, Inc., Two Wisconsin Circle, Suite 1040, Chevy Chase, MD 20815 ($3 members; $5 nonmembers).
PUB TYPE Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Administrator Guides; Administrator Role; *Age Discrimination; College Administration; Court Litigation; *Disability Discrimination; *Equal Opportunities (Jobs); Higher Education; Institutional Role; Law Enforcement; Legal Problems; *Legal Responsibility; Prevention; Program Descriptions; Risk; *Risk Management; *Sexual Harassment

ABSTRACT

This booklet discusses the risks that educational institutions face in regard to employment discrimination litigation and outlines a program to effectively manage such risks. Institutions need to address three main types of employment discrimination issues: sexual harassment, disability-based discrimination, and age discrimination. To deal with these concerns, educational institutions should implement a five-step employment liability management program to help minimize the potential liabilities resulting from employment discrimination claims. Institutions need to: (1) identify the most pressing employment discrimination liability concerns; (2) conduct an employment liability audit; (3) evaluate employment policies and procedures, revising them if necessary to minimize exposure; (4) provide training to those who supervise others or make employment decisions; and (5) utilize alternative dispute resolution (ADR) to resolve employment-related complaints. Examples of recent court cases are provided, as well as a list of suggested training materials (MDM)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED 376 769

MANAGING LIABILITY

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
United Educators Insurance Risk ~~Retention Group, Inc.~~
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC).

HE027906

BEST COPY AVAILABLE

THE ISSUE

Heightened public awareness, publicity concerning recent lawsuits, and United Educators' claims trends have all focused our attention on employment discrimination issues. In the past two years, significant social legislation and Supreme Court opinions involving civil rights, sexual harassment, disabilities, and family and medical leave have expanded the liability exposure of academic institutions greatly. A proactive administrative approach is crucial to assure that compliance is not only a matter of policy, but also practiced regularly by those responsible for faculty and staff hiring, promotion, and termination.

This issue of *Managing Liability* will be of interest to human resources administrators, counsel, business officers, risk managers, and others, including academic administrators. We encourage you to distribute copies to all who are responsible for employment matters.

—Burton Sonenstein, President

WHAT CAN AN INSTITUTION DO?

There is no simple or guaranteed way to eliminate employment discrimination claims. Nonetheless, there are lessons to be learned from the experiences of educational institutions. We have reviewed claims filed with United Educators, discussed loss prevention strategies with our insureds, and conducted experimental employment audits at several member institutions.

The result is a ***five step employment liability management project*** *that can help minimize the potential liabilities resulting from employment discrimination claims.*

1. Identify the most pressing employment discrimination liability concerns.

2. Conduct an employment liability audit.

3. Evaluate employment policies and procedures, revising them if necessary to minimize exposure.

4. Provide training to those who supervise others or make employment decisions.

5. Utilize alternative dispute resolution (ADR) to resolve employment-related complaints.

Once an institution decides to conduct an employment liability management project, a project team should be chosen. The team should include members with professional expertise, as well as the chief academician and other senior administrators with substantial responsibility for employment matters. Be sure to include those with decisionmaking authority for both faculty and staff employment matters. The project team should be headed by a key official, academic officer, or administrator, such as the chief financial officer, the provost, or the general counsel. The project leader should be someone who is able to make available the necessary time, who will secure the respect and involvement of faculty and staff, and who will effectively manage the project.

Involve legal counsel early. Counsel should direct an audit if one is performed and can also be helpful in drafting policy revisions, assisting with training, and advising on communications with the Board and outside groups such as unions. Make sure that counsel chosen to work on the project has expertise in the relevant employment discrimination issues, an appreciation of the academic culture, and recent experience with the educational institution's employment patterns. Even institutions with inside legal counsel may want to retain outside counsel with specialized experience. Public institutions will need to consider whether the attorney general or the state employment official needs to be involved or merely advised.

EMPLOYMENT DISCRIMINATION

A Risk Management Strategy

By Sandra H. McMullan

Traditionally, the liability concerns of educational institutions focused on accidents and physical injuries. However, in recent years, employment-related issues and the claims they generate, especially those relating to discrimination, have emerged as important liability concerns. No subgroup of institutions—*e.g.*, small, medium, or large; public or private; west coast, midwest, or east coast—is being spared the experience of contending with aggrieved employees. In United Educators' six years of operation, we have received over 1,300 claims arising from the employment relationship, representing almost 64% of all reported educators legal liability claims. A significant percentage of the employment-based claims involve allegations of discrimination.

High profile cases, both outside and inside higher education, underscore the potential impact of employment discrimination liability:

- Recent employment discrimination settlements in class action lawsuits against corporations include one settlement for $157 million and another for $66 million.
- A female associate at a prestigious law firm who alleged that she was sexually harassed and improperly denied a partnership sued the firm and one of its partners. The jury trial in the case lasted for weeks, revealing details of the law firm's inner workings and the lives of the individuals involved. The verdict included a $125,000 damage award for the plaintiff.
- A tenure denial case involving a law school and one of its female professors lasted six years before a settlement was reached, shortly before a public hearing in the case was set to begin.

The number of discrimination claims and their repercussions have grown substantially in recent years. Factors contributing to this growth include:

- the rising number of female, minority, disabled, older, and other workers whose employment rights are protected by law;
- the instability of employment situations during the national economic downturn that began in the late 1980s;
- the expansion of rights and remedies under the Civil Rights Act of 1991, the Americans with Disabilities Act, and tougher state human rights laws; and
- the increasing willingness of discrimination claimants to pursue remedies.

All educational institutions need to address employment discrimination liability issues and should have a practical, organized approach in this area. We are aware that institutional resources vary greatly, that public and private institutions will face differing governance and accountability issues, and that problems can change even as an employment liability project is being undertaken. Nonetheless, we believe that the five step management strategy described in this monograph can make a difference for all institutions by helping to lower the incidence of serious employment discrimination claims and by helping institutions to conform their employment practices to their institutional commitments.

ABOUT THE AUTHOR

Sandra H. McMullan is the former General Counsel and Director of Risk Management of United Educators. Ms. McMullan is currently a consultant on educational legal and legislative issues in Houston, Texas.

BEST COPY AVAILABLE

What Types of Employment Discrimination Issues Do Educational Institutions Face?

Although all types of employment claims have grown in the past fifteen years, employment discrimination claims have undergone the most dramatic growth, in both numbers and costs. Three types of employment discrimination claims are becoming particularly important to educational institutions:

- *Sexual Harassment:* United Educators has experienced an increase in employment-based sexual harassment claims and related claims arising from discipline of faculty who are found to be involved in inappropriate conduct.
- *Disability-based Discrimination:* While the Americans with Disabilities Act (ADA) does not impose new requirements on most educational institutions, the specificity of the law and growing activism by the disabled community are contributing to an increased frequency of disability-based employment discrimination claims.
- *Age Discrimination:* Age discrimination claimants continue to seek and receive damages higher than any other category of discrimination claimants. We anticipate an increase in these claims due to the recurring cycles of downsizing at universities and the provision in the Age Discrimination in Employment Act (ADEA) that generally prohibits mandatory retirement of tenured faculty after December 31, 1993.

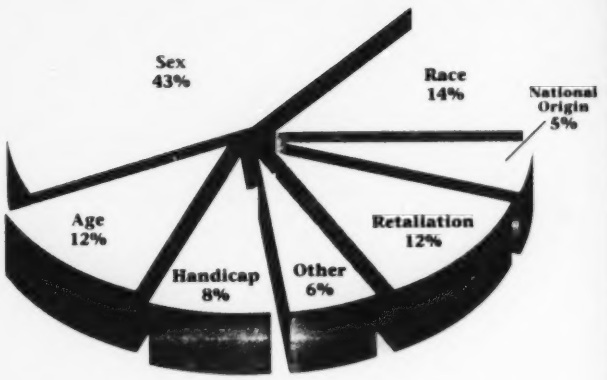
The employment relationship between faculty and the academy is unique. Although not all educational institutions utilize "tenure," the tradition of investing faculty with substantial authority and autonomy has no parallel in the business world. Typically, the employment terms and the decisionmaking processes of an institution reflect this special relationship. As would be expected, employment discrimination claims brought by faculty tend to be disruptive to the institution, complex to resolve, and costly to defend. Cases involving faculty, such as the following, can and do arise in institutions all over the country:

- A member of the faculty, with a reputation for making sexual overtures toward undergraduates, is the subject of a student complaint. The faculty member is eventually disciplined and later sues the student and the institution for libel, slander, and breach of contract.
- An unsuccessful applicant for a faculty position who has a speech impediment, but whose expertise and teaching skills are acceptable, files a discrimination claim.
- An older faculty member who accepted an early retirement offer in lieu of going through an "embarrassing" evaluation later sues, alleging age discrimination.

The impact of claims brought by staff employees should not be underestimated. Almost sixty percent of United Educators' employment claims, and a consistently high proportion of the most costly claims, have been brought by staff, rather than faculty. These claims tend to involve the internal culture of the institution, challenge the decentralized

BEST COPY AVAILABLE

DISCRIMINATION ALLEGATIONS



This information is derived from United Educators' claim data. There were over 3,000 causes of loss alleging discrimination in the approximately 1,300 employment-based claims received between 1987 and 9/30/93.

Almost sixty percent of United Educators employment claims, and a consistently high proportion of the high cost claims, have been brought by staff rather than faculty.

decisionmaking of the academy, and attract the attention of many in the broader community when discrimination is involved. The following are representative of the types of staff claims we have received:

- the disability discrimination suit brought by the long-term departmental secretary with a heart condition who is terminated for her tardiness by a new chairperson;
- the age discrimination allegation made by a 60 year old maintenance worker who is terminated in a downsizing program, but whose duties are assumed by a younger person;
- the EEOC complaint filed by a staff employee who claims that she did not receive a promotion because she would not accept her boss' social invitations.

Undertaking an employment liability management project without appropriate planning and consultation can expand, rather than reduce, liability exposure. With the proper approach, the project can be effective, as well as cost-efficient for the institution.

We recommend that each institution review its own claims history before deciding on the scope of its employment liability project.

STEP 1

IDENTIFY THE MOST PRESSING EMPLOYMENT DISCRIMINATION LIABILITY CONCERNS

Decide on the Goals and Marshal Resources

In United Educators' experience, sexual harassment, age discrimination, and discrimination based on disability appear to be the three top priority concerns based on national claims trends. However, we recommend that each institution review its own claims history before deciding on the scope of its employment liability project.

A claims inventory form is a useful way to help collect information about the institution's claims (and/or employment grievance) history. It should include the name of the claimant, the academic or administrative department involved, the type of discrimination alleged, the type of claim/forum (e.g., administrative charge filed at the EEOC or lawsuit filed in state court), and the costs incurred by the institution. We recommend that at least three years worth of information be collected and analyzed in order to uncover any patterns that may exist. Such a review may reveal that a number of claims involve a particular discrimination issue, such as sexual harassment, or a specific policy. The review may also reveal that a particular supervisor or department has been involved in a number of claims, which may lead an institution to decide that the activities of that individual or department require further scrutiny.

The Five Step Risk Management Strategy

Define the project's scope. For example, does the institution want to:

- focus on a department or area that has faced a specific type of discrimination claim (e.g, physical plant/public safety or the tenure process);
- review compliance with a new law, such as the ADA or the Family and Medical Leave Act; or
- conduct a comprehensive cradle-to-grave employment practices review.

It is also important to decide whether the project will separate or combine a review of faculty and staff employment policies, and whether it will address the unique problems and issues surrounding union employees.

Take steps to ensure that all necessary resources will be available to meet the project goals. For example:

- If the project anticipates an audit, make sure that funds are available for outside legal fees, or if inside counsel will conduct the audit, that legal staff will be available.
- If the project anticipates revising policies and procedures that may require Board action, secure the Board's commitment to act promptly on recommendations.
- If training is contemplated, seek funding approval to enable the production of work materials, the securing of temporary staff to replace workers participating in the program, and the hiring of any outside consulting staff that will be needed.

Develop Time Guidelines

Set a timetable for the project as a whole and establish detailed schedules for each step undertaken. The timetable and schedules should be realistic, balancing the need for adequate time to carry out the project with the need to produce a result within a reasonable

timeframe. Throughout the duration of the project, the team should check its progress against these time guidelines.

Anticipate Confidentiality Concerns

Educational institutions must anticipate that a broad group of persons, including students, faculty, alumni, and the media, will be interested in their review of compliance with civil rights laws. Before undertaking a risk management employment project, check with counsel to determine if the institution is under a legal obligation to release written results of internal reviews. Most public institutions are subject to state "government in the sunshine" laws, which vary considerably from state-to-state. It is important to anticipate how such obligations might affect the institution's ability to conduct this self-study in confidence.

STEP 2

CONDUCT AN EMPLOYMENT LIABILITY AUDIT

We recommend that institutions conduct an employment liability audit as part of the project in order to identify any employment-related policies, procedures, or practices that may not comply with law and to recommend revisions before the policies, procedures, or practices are challenged. Prior to undertaking an audit, it is important to make sure that the institution is committed to providing all resources necessary to see the audit through to completion and to implementing any recommendations that result from the audit.

What is an Employment Liability Audit?

We use the term "employment liability audit" to refer to a systematic legal compliance review of matters relating to one or more employment discrimination issues. The goals of an audit are:

- to understand how the institution deals with the issue(s) under review, developing a "big picture" through a comprehensive look at many facets of the institution's policies and operations, including a determination as to whether the institution is effectively communicating the key civil rights laws to those in decision-making positions;
- to decide whether the institution should modify its position, policies, procedures, or practices concerning the issue(s); and,
- to make recommendations to the appropriate institutional official.

Why Conduct an Audit?

An audit costs less than a suit. In response to a growing concern about employment liability, many well-respected corporations have created employment audit programs. Although initially corporate managers often focused their audit programs on compliance with specific new laws, many managers are now committed to conducting annual audits of policies and practices as a training and loss prevention tool. The potential defense and indemnification costs of a single suit dwarf the costs of even the "cadillac" version of an audit.

The potential defense and indemnification costs of a single suit dwarf the costs of even the "cadillac" version of an audit.

An audit can identify problems and inadequacies in the institution's employment-related written materials. Educational institutions tend to have many sources of employment policies, the most important of which are faculty and staff handbooks and manuals. As laws change, these documents need to be revised.

For example, the following policy issues might be identified in an audit:

- the absence of a sexual harassment policy;
- the failure to mention disabilities in the EEO statement;

THE COSTS OF DISCRIMINATION

The potential financial costs of employment discrimination cases are staggering:

- In 1991, the EEOC collected a record $188 million through litigation and conciliation of employment discrimination claims.
- During the confirmation hearings for Judge Ruth Bader Ginsburg, Senator Hatch commented that the average employment claim costs $80,000 to defend.

Three recent higher education cases involving sex discrimination highlight the financial impact on colleges and universities:

- A public southern university settled a lawsuit involving sex harassment and wrongful termination allegations for $575,000 after a jury had awarded the plaintiff $330,000 in a partial verdict and before a decision was rendered on backpay and reinstatement issues.
- A private New England university settled a tenure denial case for $260,000.
- A female coach at a mid-Atlantic university was awarded $1.11 million in damages, excluding attorneys' fees, in a case that is now on appeal.

In addition to financial costs, employment discrimination claims generate enormous nonfinancial costs:

- The *credibility debit* or *reputational cost* created when an employer is accused of violating its employees' civil rights.
- The *instability factor* that results when other employees, faculty, and student groups must cope with the conflict.
- The *drain on limited human resources* to investigate a complaint or participate in the litigation process.

- the existence of a requirement, stated in a faculty handbook, that the performance of faculty members must be reviewed beginning at age 65;
- the existence of a requirement, cited in a staff manual, that a job applicant must pass a physical examination before being offered a job.

Sometimes policies are hastily prepared or revised to respond to a change in the law or to a new issue of campus concern. Even an institution that consistently secures the advice of counsel when making revisions to its policies may revise a policy document without considering how the change may affect related documents, thus inadvertently creating a new problem. For example, an institution may issue an updated sexual harassment policy stating that a faculty member may be discharged for sexual harassment, while continuing to use a faculty handbook that is unclear as to whether a faculty member may be discharged for sexual harassment.

An audit can identify practices which could create liability. Even institutions with excellent, up-to-date policies still encounter problems in how those policies are carried out. In some instances, practices can create liability despite the existence of an excellent written policy. A well-done audit can uncover the following practices that might create exposure for an institution:

- routinely transferring employees who complain of sexual harassment;
- using an application form that contains questions that are no longer permitted under the Americans with Disabilities Act;
- inquiring about the post-surgical health of an internal applicant for a promotion; and
- conducting job interviews in inaccessible locations.

Who Should Direct the Audit?

Any employment audit that is performed should be done under the direction of legal counsel.

We found firms willing to take on such proactive work for fees well below the fee they charge for litigation. The three employment liability audits which were field tested for United Educators were done by outside firms for a fixed fee of $5,000.

Preserving the Confidentiality of the Audit

Although credible arguments can be made to prevent disclosure of an audit report, there is no assurance that an institution will successfully shield its report from disclosure in discovery.

Oftentimes referred to as a "confessional document" by plaintiffs' lawyers, an audit report may be sought to support allegations of intentional discrimination, and disclosure of a report identifying an institution's noncompliance with civil rights laws could create and expand liability exposure. An institution should not start an audit until counsel has reviewed the confidentiality concerns and fully considered what steps the institution will take to preserve the confidentiality of the audit.[1]

An institution may increase the likelihood of successfully invoking the attorney-client and attorney work product privileges by following these suggestions:

- Involve legal counsel at the inception of the audit. The administrator's or Board's authorization letter for the audit should clearly reflect that all aspects of the audit, including collection of information and analysis of data, are being performed for the purpose of rendering legal advice.
- Any pending or anticipated litigation involving employment claims should be reflected in the authorization letter, the retention agreement, and the audit itself.
- Requests for outside counsel or any in-house memorandum concerning the audit should state that counsel is being asked to provide legal, not business advice, and that the investigation is to culminate in legal analysis of past conduct and legal advice relating to recommendations for future conduct. This is particularly important for inside counsel performing an audit, because the role of inside counsel is often a mixture of administrative and legal responsibilities.
- If necessary, counsel should be expressly authorized to employ non-legal personnel in collecting and analyzing pertinent information and it should be stated that the activities of the non-lawyers are totally under counsel's direction and control.
- Confidentiality should be steadily maintained, or the privilege may be deemed to have been "waived." In most jurisdictions, once waived, any potential privilege is lost. The authorization and retention documents should make clear that the audit and materials upon which it is based, including communication with counsel, will be maintained as strictly confidential. Employees who are involved in the audit should be briefed as to the legal nature of the audit and the fact that their role in the audit is to remain confidential and not be disclosed.
- The audit report should begin with a statement that its contents are based upon confidential information obtained from the client to render legal advice and services, and, if appropriate, that it is generated in anticipation of litigation.
- Controls should be developed regarding distribution of the audit report. Ideally, the report's distribution should be limited to a single individual. If the report must be given to more than one individual, it should be given to as few individuals as possible, selected on a "need-to-know" basis. In any event, those to whom the report is given should be told not to distribute it. The report should be clearly marked to show that it is a confidential, legal document with a label such as: *"Privileged and Confidential — Protected by Attorney-Client Privilege, Attorney Work Product in Anticipation of Litigation — Report for internal use only and not to be circulated or distributed."*

Even if an institution follows each of these steps, a court may permit a plaintiff in subsequent litigation to discover materials relating to the audit and decisionmakers should be made aware of this fact.

What Information to Collect

The following written materials should be reviewed in the course of an audit:

- written personnel policies and procedures;
- staff and faculty handbooks;
- recruitment materials;
- employment application materials;
- labor agreements;
- benefit plans and summary plan descriptions, including those that cover tuition remission, employee educational assistance, health benefits, and pension benefits;
- affirmative action plans and EEO-6 and other reports to government agencies;
- memoranda, internal and otherwise, pertaining to relevant subjects such as affirmative action and equal employment opportunity;
- employment claims and lawsuit files;
- consent decrees and conciliation agreements; and
- employment and termination agreements with individual employees.

To be as comprehensive as possible, the audit should also include interviews with people involved in the employment process.

Any employment audit that is performed should be done under the direction of legal counsel.

STEP 3

EVALUATE EMPLOYMENT POLICIES AND PROCEDURES, REVISING THEM IF NECESSARY TO MINIMIZE EXPOSURE

Although appropriate policies and procedures will not, in and of themselves, prevent discrimination claims, their absence may create or increase liability.

Even if an institution decides not to do a comprehensive audit as part of the employment liability project, at a minimum it should review all policies and procedures within the scope of the project. For example, if a project focuses on a particular department, then the university should review all the policies and procedures that apply to that department. On the other hand, if the project focuses on a specific law, then the review should cover all policies and procedures throughout the university relevant to that law.

Why Are Policies and Procedures Important?

Employment policies, and procedures to implement them, have become an important tool for employers in dealing with employment discrimination liability risks. Although appropriate policies and procedures will not, in and of themselves, prevent discrimination claims, their absence may create or increase liability. The presence of up-to-date and enforced civil rights policies and procedures may also be used as evidence that the institution carries out its civil rights obligations. The need for attention to this aspect of an institution's operations has grown with the passage of the Civil Rights Act of 1991 because that law added compensatory and punitive damages as potential remedies for intentional discrimination in Title VII cases. Policies and procedures should be evaluated and revised if necessary, even if an institution decides not to undertake a full scale employment liability audit.

What Policies and Procedures are Needed?

In order to compile a complete list of required or advisable policies, institutions must review applicable federal and state law with experienced labor counsel. As a guideline, a recent publication of the National Association of College and University Business Officers (NACUBO)[2] lists fifteen "essential" policy and procedure statements, including the following three which directly pertain to discrimination issues:

- *Equal Employment Opportunity Policy.* As federal grantees, most colleges and universities are required to have nondiscrimination policies that embrace employment practices. Such policies are prevalent even when not required because they signal an employer's commitment to comply with the law.
- *Affirmative Action Policy.* Although the U.S. Supreme Court has invalidated some voluntary affirmative action plans, colleges often have an affirmative action policy with an accompanying plan. It is important that any affirmative action plan be based on an analysis of actual hiring patterns and needs.
- *Sexual Harassment Policy.* Many colleges began creating sexual harassment policies in the past ten years. NACUBO refers to such a policy as essential and strongly advises institutions to include a statement addressing consensual relationships.

Other Policies that May Give Rise to Discrimination Claims. Some of the most difficult civil rights challenges arise from the application of policies that are not, on their face, related to civil rights. Inconsistent application of facially neutral policies may provoke a challenge.

The Revision Process

Revising policies and related procedures at an educational institution can be a complex task. In some cases, revision may require the appointment of a committee, acceptance by the faculty senate, and review and enactment by the Board. Some public institutions are not able to revise materials prepared by the State.

Be sure to consult with counsel about the various requirements imposed on the policy revision process for your institution.

STEP 4

Provide Training To Those Who Supervise Others or Make Employment Decisions

Why is Training Important?

Even the best drafted policies and procedures will not shield an institution from liability unless they are distributed, explained, and consistently followed. The decentralization of employment decisionmaking at institutions of higher education, coupled with the sheer number of people who participate in employment decisions, pose tremendous challenges to an institution seeking to manage employment-related risks.

Training on employment discrimination issues serves at least four purposes:

- it helps administrators to understand and consistently enforce an institution's civil rights policies;
- it puts faculty and staff on notice as to what is required in the workplace, and how to bring to the attention of the administration problems that may arise on the job;
- it helps create a common set of operating rules that can be used throughout the institution; and
- it provides affirmative proof of an institution's intention and efforts to comply with civil rights laws.[3]

Who Should Receive Training?

Everyone who has supervisory responsibilities or who makes employment decisions at an institution should receive training concerning legal issues related to employment. Besides managers of the various administrative departments (e.g., food service, student aid, admissions, facilities, and finance), faculty members who supervise secretaries, graduate students, and teaching, laboratory, or research assistants should receive training. Also, training should be provided to members of committees involved in employment decisions, such as search committees, and promotion and tenure committees. Finally, remember that members of the Board hire and fire the president; they also need to know the law, and their responsibilities and liabilities.

Create Incentives to Participate in Training

There are several strategies that have worked elsewhere in convincing decisionmakers to participate in employment training:

From the Top: It is important to secure and communicate the institutional leadership's commitment to training. Providing information to the leadership about the value such training will have when the institution's commitment to civil rights is challenged, particularly when the institution must demonstrate that it took "prompt and effective remedial action" to eradicate problems, may help to focus the leadership's attention on this important subject.

Use Self-Interest: Self-interest can be the most effective motivation in ensuring participation in training. Some reluctant administrators and faculty have expressed greater interest in participating in sexual harassment training after hearing about recent detenuring incidents. Reminding supervisors and faculty serving on rank and tenure and search committees of their personal exposure may be worthwhile. Use real cases to convince the leadership of the value of training.[4] On a more positive note, be sure to indicate that the institution's indemnification policies will be discussed.

It's Part of Your Job: Some institutions consider whether an individual has participated in training and complied with institutional policies during the performance evaluation process. The prospect of a lower performance rating or the loss of a salary increase or a merit award because of inattention to nondiscrimination policies can increase attendance at training

Even the best drafted policies and procedures will not shield an institution from liability unless they are distributed, explained, and consistently followed.

The following is a list of suggested types of materials that might be useful to discuss or provide to participants in a training program:

- *An Overview of Pertinent Employment Laws, including:*
  Title VII of the Civil Rights Act of 1964, as amended
  Title VI of the Civil Rights Act of 1964, as amended
  Civil Rights Act of 1991
  Americans with Disabilities Act of 1990 (ADA)
  Section 504 of the Rehabilitation Act of 1973, as amended
  The Age Discrimination in Employment Act of 1967, as amended (ADEA)
  Title IX of the Education Amendments of 1972, as amended
  Equal Pay Act of 1963
  Family and Medical Leave Act of 1993

- *Written Policies and Procedures, including:*
  Faculty Handbook
  Staff Handbook
  EEO Policy
  Affirmative Action Policy
  Sexual Harassment Policy

- *Materials Relating to Any Union/Management Relationships*
  Collective Bargaining Agreements
  Grievance and Arbitration Procedures

- *Materials in Use at the University*
  Application Forms
  Guidelines for Hiring
  Job Description Forms
  Performance Evaluation Forms
  Guidelines for Conducting Performance Evaluations

- *Samples of Materials that Training Participants May Need to Create in the Course of Their Jobs*
  Sample Offer Letters
  Sample Employment Contracts
  Sample Letters of Reprimand and Discharge

- *Materials Created to Reinforce Information Covered During the Training*
  List of Do's and Don'ts
  Question and Answer (Q&A) Reviews of Materials

sessions and heighten compliance with policies.

You'll be Glad You Did: A few institutions are rewarding departments that secure one hundred percent participation in anti-discrimination training with education's equivalent of bonuses — budget supplements, equipment purchases, or extra vacation days.

You'll Be Sorry You Didn't: A few institutions have required departments that did not participate in training to pay for litigation, settlement costs, or verdicts from their own departmental budgets.

Focus the Training — Audience and Topics

Orientation and Ongoing Training Programs

Create "orientation" programs for new employees and for new supervisors, whether promoted or newly hired. The actions of supervisory employees may create liability for their employers, so each supervisor should receive training concerning the legal doctrine of agency and other important issues, particularly as they relate to hiring, performance reviews, and employment terminations. Do not forget that search and tenure committees, academic deans,

department chairs, and other faculty with staff supervisory responsibilities belong in this group and may need a special orientation session.

Operate an ongoing program focused on "hot topics" and other important issues. For example, if the institution will be laying people off in the near future, provide specialized training to all personnel who will be involved in implementing the layoff. Other hot topics may include:

- accommodating disabled employees under the ADA;
- handling sexual harassment complaints; and
- responding to requests for family or medical leave.

Other possible training topics include:

- recruiting and hiring issues, including what inquiries are not permissible in an interview or application and how to document hiring decisions;
- how to perform evaluations for faculty promotion and tenure decisions;
- appropriate documentation for progressive discipline;
- issues involved in the termination of staff;
- defamation and slander issues in the employment context;
- privacy issues in the employment context; and
- writing letters of recommendation.

Create Effective Programs and Materials

It is a great challenge to match a training program to the audience in the higher education setting. Most of the participants will be highly educated, familiar with the institution, and, in many instances, they will be familiar with the law. Reflect that in your program and materials.

Use an Interactive Format: Role playing is often an effective training tool. Use of videotapes can also help to encourage discussion. Be prepared to answer questions that may arise concerning institutional policies and topics addressed in the training.

Select Effective Presenters: Be sure that presenters are prepared for the audience and for likely questions. Select presenters who have credibility with the audience, who can speak without using legal jargon, and who understand collegiality and faculty concerns. If outside speakers are used, also have an insider attend. It is a good idea to have a lawyer available who can address relevant legal issues.

Select Your Audience: It may be useful to hold separate training sessions for faculty and for staff, or by department. Match the issues to the audience and consider setting a maximum size for training groups in order to encourage interaction within groups.

Document the Training

The institution should document the contents of the training program (subjects covered, agenda for the program, list of speakers, and the written materials provided to participants), participation rates, and the names of participants. Some sophisticated personnel systems have training participation records in each individual personnel file.

Role playing is often an effective training tool.

ACKNOWLEDGMENTS

United Educators would like to thank the many individuals who contributed to or reviewed this monograph, including the members of the Risk Management Advisory Committee. We would especially like to thank the following for their support, comments, and guidance: **Sheila Trice Bell**, Esq., University Legal Counsel of Northern Kentucky University; **Randolph M. Goodman**, Esq. of Feder, Goodman & Schwartz; **Barbara Lee**, Esq., Professor at Rutgers University; **Alison Marshall**, Esq. of Miller, Canfield, Paddock and Stone; **Lewis M. Popper**, Esq., General Counsel of the University of Pittsburgh; and **Peter Ruger**, Esq. of Peper, Martin, Jensen, Maichel & Hetlage.

STEP 5

UTILIZE ALTERNATIVE DISPUTE RESOLUTION (ADR) TO RESOLVE EMPLOYMENT-BASED COMPLAINTS

Disputes can often be resolved more quickly through ADR than through the judicial process.

Once areas of concern and existing claims have been explored during the employment discrimination liability project, the institution should consider how it can best handle employment-based conflicts. The project can be a catalyst for discovering the benefits of alternative dispute resolution ("ADR").[5]

What is ADR?

The term ADR is used to describe a number of different processes that occur outside of court to resolve a dispute. ADR usually involves a third party "neutral". It emphasizes creativity, flexibility, and cooperation in the dispute resolution process. ADR does not require either party to admit fault or accept blame; it requires only that the parties acknowledge the existence of a dispute. ADR processes include the use of an ombudsman, mediation, early neutral evaluation, minitrials, factfinding, and arbitration.

The Government Encourages Use of ADR

Three recent laws have focused attention on ADR by encouraging its use in specific situations. The Administrative Dispute Resolution Act encourages the use of ADR in disputes involving federal government agencies. Several agencies have followed the mandate of that law by establishing mediation and other ADR programs, including the EEOC, and the Departments of Education, Labor, and Health and Human Services. In the employment discrimination area, both the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991 encourage plaintiffs and defendants to use ADR.[6]

In addition, there is a trend among courts and agencies toward suggesting, and in some cases requiring, that parties attempt to use ADR before presenting their dispute to the court or agency for decision. We expect to see this trend continue, given the limited resources available to courts and agencies and the backlog of cases on their dockets.

Why Use ADR?

- *ADR can be used to resolve disputes that are not ripe for litigation or that may not be susceptible of resolution through litigation.* In the long run, early intervention with ADR can save institutional resources and avoid the hostility that often develops during the course of litigation. An institution need not wait until an employee files a formal grievance or sues before resolving claims of discrimination if the institution has made available an ombudsman or mediation program to address such matters.

- *Disputes can often be resolved more quickly through ADR than through the judicial process.* Litigation forces the parties to wait for their turn on the court or agency docket, and a variety of factors outside of the control of the parties and the court or agency can affect the timing of a resolution. ADR, on the other hand, can operate on an expedited basis at a pace set by parties.

- *ADR is usually less expensive and disruptive than litigation.* The financial burden of discovery, a trial, and possibly an appeal, makes the prospect of litigation daunting for institutions trying to conserve their financial resources. Moreover, litigation is distracting to institutional personnel and representatives involved in the case, often taking them away from their normal duties for long periods. ADR processes are generally much less protracted than litigation.

thus allowing institutions to save legal fees and avoid disruption of their academic activities.

- In contrast to litigation, *ADR proceedings can be kept private.* Except in unusual circumstances, litigation is a matter of public record and public scrutiny of a dispute can exacerbate an already tense situation. Parties can generally agree to keep ADR proceedings confidential, which minimizes posturing and facilitates a frank exchange of views.
- Unlike litigation where the remedies are limited, *ADR allows for creative solutions* that respond to the parties' needs and the real issues at hand.
- ADR processes are worthwhile even if a settlement is not achieved at the end of the ADR session(s). *ADR may act as a catalyst for a resolution that occurs later* or, even if a dispute is not completely resolved through the use of ADR, the process may clarify and focus issues.

ADR in the Educational Setting

Educational institutions should become familiar with, and use, ADR to resolve disputes that have not yet become formal complaints or lawsuits, as well as to resolve cases already in litigation. The advantages of ADR to educational institutions go beyond the pragmatic benefits described above. ADR also advances the academic goals of social responsibility, collegiality, and consensus.

Developing an institutional commitment to ADR is crucial to motivating individuals to use ADR in the educational setting. Once developed, the institution's commitment should be communicated to the officials, administrators, and academic leaders who represent the university, as well as to individuals who may have a dispute with the institution. The institution should then demonstrate its commitment by integrating ADR into the institution's policies, procedures, and training.

United Educators encourages and promotes the use of ADR, particularly mediation. We have become convinced of the value of mediation because we have seen it succeed, providing creative resolutions that could not have been achieved through litigation. Conversely, we have also seen disputes mired in litigation that ultimately benefited neither party, when a mutually satisfactory resolution could have been achieved with less expense and frustration through the use of ADR. Our experiences with mediation convince us that ADR holds great promise for prompt and satisfactory resolution of conflicts involving educational institutions and their employees.

CONCLUSION

The five step strategy set out in this issue of *Managing Liability* is a proactive approach to the employment discrimination issues that face every educational institution. The strategy is flexible enough to be used by any institution and can yield significant benefits with a modest investment of time and resources.

ENDNOTES

1. Subjects related to the confidentiality of employment audits are discussed more comprehensively in "Discovery of Employment Audits: Can They Be Protected?" a July 1993 paper prepared for United Educators by Larry Thompson.
2. Ronald A. Bouchard, *Human Resource Practices for Small Colleges* (NACUBO, 1992).
3. See generally H. Comisky, "'Prompt and Effective Remedial Action?' What Must an Employer Do to Avoid Liability for 'Hostile Work Environment' Sexual Harassment," 8 *The Labor Lawyer* 181 (1992), which discusses the need for an effective policy against sexual harassment.
4. Barbara Lee, "Bulletproofing the Workplace," presented at the 1993 NACUA Annual Meeting which cited *Clark v. Claremont University*, 8 Cal. Rptr. 2d 151 (Cal. App.2nd Dist. 1992) and *Fields v. Clark University*, 966 F.2d 49 (1st Cir. 1992). The presentation also referred to LaNoue and Lee, *Academics in Court: The Consequences of Faculty Discrimination Litigation* (University of Michigan Press, 1987).
5. For an overview of ADR, see United Educators' *Reason & Risk*, Vol. 1, No. 3 (Summer, 1993).
6. Administrative Dispute Resolution Act, Pub.L.No. 101-552, 104 Stat. 2738 et seq., 5 U.S.C. 571 et seq. (1990); Americans with Disabilities Act of 1990, Pub.L.No. 101-336, Section 513, 104 Stat. 377, 42 U.S.C. 12212; Civil Rights Act of 1991, Pub.L.No. 102-166, Section 118, 105 Stat. 1081 (see notes to 42 U.S.C. 1981).

SERVING

United Educators Insurance Risk Retention Group, Inc.

Two Wisconsin Circle, Suite 1040
Chevy Chase, MD 20815
(301) 907-4908
FAX: (301) 907-4830

BURTON SONENSTEIN
President & CEO

ARTHUR G. BROADHURST
Senior Vice President

■

LAURA A. KUMIN
Director of Risk Management and General Counsel

■

JOSEPH B. MCCULLOUGH
Vice President for Claims Administration

PATRICIA A. GOTSCHALK
Senior Claims Counsel

■

For additional information concerning risk management contact Laura Kumin at (301) 215-6417.

PAGE DESIGNS UNLIMITED
Design & Layout

United Educators Insurance Risk Retention Group, Inc.

Two Wisconsin Circle

Suite 1040

Chevy Chase, MD 20815

FIRST CLASS

BEST COPY AVAILABLE